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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT, PETITIONER,

vs.

MORRIS ABRAM, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR CERTIORARI FILED OCTOBER 1, 1954

CERTIORARI GRANTED APRIL 23, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT, PETITIONER,

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MORRIS ABRAM, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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[1-4] In Supreme Court of New Mexico

[File endorsement omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 30, 1953

To: The Honorable Justices of the above-entitled Court:

F. Gordon Shermack, Attorney, having been appointed by the Court in this matter, states:

1. That Paul H. Breithaupt, the person in whose behalf this Writ is applied, is imprisoned in the State Penitentiary, Santa Fe County, New Mexico, by Warden of said Penitentiary, Morris Abram.

2. That Paul H. Breithaupt is not committed by virtue of any process, judgment, decree or execution specified in Section 25-1101 N. M. S. A., 1941.

3. That the cause of such confinement according to the knowledge and belief of your petitioner is a commitment from the District Court of Eddy County, New Mexico, a copy of which is attached hereto and identified as Exhibit A.

4. That said imprisonment is alleged to be illegal for the following reasons, to-wit: That the petitioner was denied due process of law through the use of the results of a blood test made on blood taken from his body while he was unconscious, thereby compelling him to give evidence against hemself, which evidence was gained by an unlawful search and seizure in violation of the Constitution of the United States, Amendments 4, 5, and 14, and the Constitution of the State of New Mexico, Article 2, Section 18.

[5] 5. That Petitioner has previously applied to the District Court for Santa Fe County for a Writ of Habeas Corpus, which Writ was denied March 7, 1952.

WHEREFORE, Petitioner prays that a Writ of Habeas Corpus may issue, directed to the said Morris Abram, commanding him to have the body of the said Paul H. Breithaupt, by him imprisoned and detained, before the Court, at a time and place therein specified, to do and receive what shall then and there be considered concerning the said Paul H. Breithaupt, together with the time and

cause of such imprisonment and detention, together with said writ.

Dated this 30th day of July, 1953.

F. GORDON SHERMACK,
Attorney for Petitioner.

Duly sworn to by F. Gordon Shermack jurat omitted in printing.

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[6] EXHIBIT "A" TO PETITION

COMMITMENT TO PENITENTIARY

STATE OF NEW MEXICO

To the Sheriff of Eddy County and to the Superintendent or Warden of the New Mexico State Penitentiary, situated at Santa Fe, In the State of New Mexico, Greeting:

WHEREAS, At a regular term of the Fifth Judicial District Court of the State of New Mexico, begun and held within and for the County of Eddy on the 2nd Monday of March, 1951, and on the 8th day of said term, the same being the 5th day of April, 1951, Paul H. Breithaupt was duly convicted of the crime of Involuntary Manslaughter and by the said Court sentenced to imprisonment for the full term of not less than six years and not more than ten years beginning with the 29th day of March, 1951, such imprisonment to be in the New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico;

THEREFORE, You the Sheriff of Eddy County, are hereby commanded to take the said Paul H. Breithaupt in custody and deliver him, together with this writ, to the said Superintendent or Warden of the said State Penitentiary, or to some other duly authorized Agent of the Superintendent or Warden; and you, the Superintendent or Warden of the New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico, are hereby commanded to receive the said Paul H. Breithaupt and safely and securely confine him, the said Paul H. Breithaupt in said New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico, for the full term of not less than

six years and not more than ten years beginning with the 29th day of March, 1951, and this writ shall be your sufficient warrant for so doing.
(Seal)

FIFTH JUDICIAL DISTRICT

D. C.

EDDY COUNTY, NEW MEXICO

WITNESS THE Hon. C. Roy Anderson Judge of the Fifth Judicial District Court, and the seal of said Court, this 5th day of APRIL A. D., 1951.

(signed) MARGUERITE E. WALKER,
Clerk of the District Court,
Eddy County, New Mexico.

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[7] In Supreme Court of New Mexico

[File endorsement omitted]

ORDER FOR WRIT OF HABEAS CORPUS TO ISSUE—Filed July 30, 1953

Upon reading and filing the Petition of Paul H. BREITHAUPT, duly signed and verified on his behalf by his attorney F. Gordon Shermack, whereby it appears that the Petitioner is illegally imprisoned and restrained of his liberty by Morris Abram, Warden of the State Penitentiary at Santa Fe, New Mexico, and stating wherein the alleged illegality consists, from which it appears to me that a writ of habeas corpus ought to issue:

It is ordered that a writ of habeas corpus issue out of and under the seal of the SUPREME COURT OF THE STATE OF NEW MEXICO, directed to the said Morris Abram and the Sheriff of Santa Fe County, commanding them to have the body of the said PAUL H. BREITHAUPT before the SUPREME COURT OF THE STATE OF NEW MEXICO, in the courtroom of said court, at the county of Santa Fe, on the 10th day of August, 1953, at 9 o'clock A. M., of that day, to do and receive what shall then and there be considered concerning

the said Petitioner, PAUL H. BREITHAUPT, together with the time and cause of his detention, and that they have then and there the said writ.

Dated this 30th day of July, 1953.

JAMES B. McGHEE,
Acting Chief Justice of the Supreme Court.

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[8] In Supreme Court of New Mexico

[File endorsement omitted]

WRIT OF HABEAS CORPUS—July 30, 1953

The State of New Mexico to the Sheriff of Santa Fe County and Morris Abram, Warden of the State Penitentiary:

YOU ARE HEREBY COMMANDED to have the body of PAUL H. BREITHAUPT by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before THE SUPREME COURT OF THE STATE OF NEW MEXICO, on the 10th day of August, 1953, at 9:00 a.m. o'clock and in the COURTROOM of the SUPREME COURT BUILDING in Santa Fe, New Mexico, at which time said Court will receive what then and there will be considered concerning the said Paul H. Breithaupt and have you then and there this writ.

WITNESS THE HONORABLE DANIEL K. SADLER, Chief Justice of the Supreme Court of the State of New Mexico, attested by my hand and seal of said Court this 30th day of July, 1953.

LOWELL C. GREEN,
Clerk.

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[9] In Supreme Court of New Mexico

RETURN TO WRIT OF HABEAS CORPUS—Filed August 17, 1953

Comes now the Respondent, Morris A. Abram, Warden, of the State Penitentiary of the State of New Mexico, by his attorney Richard H. Robinson, Attorney General, and

Walter R. Kegel, Assistant Attorney General, and as his return in the above entitled and numbered cause, states:

1. That at the present time Petitioner is in the Respondent's custody at the State Penitentiary of the State of New Mexico, at Santa Fe, New Mexico.

2. That Petitioner was committed to the State Penitentiary on the 5th day of April, 1951, for a term of not less than six years and not more than ten years for the crime of Involuntary Manslaughter.

3. That Petitioner is held by authority of a final commitment executed by the District Court of the Fifth Judicial District, State of New Mexico on the 5th day of April, 1951, a copy of which commitment is attached to the Petition in this cause and is made a part hereof by reference.

W. R. Kegel,
WALTER R. KEGEL,
Assistant Attorney General.

[File endorsement omitted.]

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[10] In the Supreme Court of the State of New Mexico

No. 5696

PAUL H. BREITHAUPT, PETITIONER

vs.

MORRIS ABRAM, RESPONDENT

OPINION—Filed June 15, 1954

ORIGINAL PROCEEDING IN HABEAS CORPUS

[11] OPINION

Fox, D. J.

This is an original proceeding in habeas corpus brought by the petitioner, Paul H. Breithaupt, against the Warden of the New Mexico State Penitentiary, Morris Abram, respondent.

The petitioner was the driver of a pickup truck which collided with another motor vehicle. The collision resulted in the death of three persons all of whom were riding in the vehicle with which the petitioner's pickup collided. A pint bottle containing about an inch of whiskey was found in petitioner's vehicle and the odor of alcoholic liquor was noticed on petitioner's breath. The petitioner was taken to the hospital following the accident and there, and while petitioner was unconscious, a blood sample of about 20 ccs was withdrawn by the doctor on duty at the direction of a state patrolman. The blood sample was found to contain 17% alcohol. This percentage was, in the opinion of the doctor who testified at the trial, sufficient to cause the petitioner to be under the influence of alcohol. The details of the collision are purposely omitted as being of no value in a determination of the case. The petitioner was charged with the crime of involuntary manslaughter and convicted. No appeal was taken from petitioner's conviction in the district court and the time for such appeal has expired.

The points upon which petitioner relies as grounds for the issuance of the writ are:

> "1. The time for an appeal or writ of error having passed, habeas corpus is the proper remedy to raise the issue of denial of due process.
>
> "2. The admission of evidence based on the results of a blood test made of a blood sample taken from the petitioner while he was unconscious, the use of which was protested both at the preliminary hearing and at the trial in district court, was a denial of due process."

More particularly, petitioner contends that the facts herein amount to compelling him to give evidence against him-
[12] self, which evidence has been obtained by an unlawful search and seizure in violation of Amendments 4, 5 and 14 of the United States Constitution, and Article 2, Section 18 of the Constitution of the State of New Mexico.

The record shows, without dispute, that the petitioner during the course of his trial interposed timely objections to the admission of evidence in respect to the blood test and the results of such test on the ground that the admis-

sion of such evidence would be a violation of the self-incrimination provisions of our state constitution.

The decision of the court in this case will be restricted to a consideration of whether or not the taking of the blood sample in question and the admission of the results of a test made of such sample in evidence at the trial of this cause was a denial of due process under the provisions of the 14th Amendment of the Constitution of the United States. It is conceded by the respondent and this court that a review of this question may be made by this court in a habeas corpus proceeding. See Rochin v. California, 342, U. S. 165, 72 S. Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396; Johnson v. Zerbst, 304 U. S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; U. S. v. Smith, 331 U. S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610; Price v Johnston, 334 U S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356; Hawk v. Olson, 326 U. S. 271, 66 S.Ct. 116, 90 L.Ed. 61; Huffman v. Alexander, 197 Ore. 283, 253 P.2d 289; Commonwealth ex rel. Johnson v. Burke, 173 Pa. Sup, 105, 93 Atl 2d 876; and Ex Parte Moutaw (Okla. 1951) 236 P. 2d 509.

The case upon which the petitioner chiefly relies is Rochin v. California, supra. In the Rochin case, three deputy sheriffs, upon receipt of information that the petitioner, Rochin, was selling narcotics, entered the petitioner's dwelling without warrant or authorization and then forced open the door of Rochin's room where they found Rochin [13] sitting on his bed. The officers spotted two capsules on a table by the bed but Rochin seized them before the deputies were able to so do. Rochin put the capsules in his mouth and a struggle ensued but the officers' attempt to extract the capsules from Rochin's mouth was unsuccessful. Rochin swallowed the capsules. The officers then handcuffed Rochin and took him to a hospital where, at the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach and against his will. This action produced vomiting and two capsules containing morphine were found in the vomited matter. Rochin was brought to trial and convicted on a charge of possessing a preparation of morphine, contrary to state law. The chief evidence against him was the two capsules which were admitted over Rochin's objection. The case was appealed to the Supreme Court of the United States where

it was held that Rochin had been denied due process of law, in violation of the federal Constitution and the case was reversed.

Due process is a legal proposition of difficult definition. In order to more clearly appraise the meaning and intent of the due process clause and the decision in the Rochin case, supra, in respect to the matter of due process, the following language from the majority opinion is quoted:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, (324 U. S. 401, at pps. 416-417 . . . Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' . . . or are 'implicit in the concept of ordered liberty.'
>
> * * * * * * *
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to [14] conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.
>
> ". . . Due Process of law, as a historic and generative principle, precludes defining, and thereby confin-

ing, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' "

It should be noted that in the case of Wolf v. Colorado, 338 U. S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the majority held that the conviction by a state was not a denial of due process under the 14th Amendment of the United States Constitution solely because evidence admitted by the trial court was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a Federal law in a Federal court because of an infraction of the 4th Amendment of the United States Constitution as applied in the case of Weeks v. U. S., 232 U. S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann.Cas. 1915C, 1177. In the opinion in the Wolf case, supra, it was stated that a clear majority of the State decisions have rejected the doctrine of the Weeks case, supra, including New Mexico in the case of State v. Dillon, 34 N.M. 366, 281 P. 474.

The two New Mexico decisions dealing with the matter of admission of evidence obtained in violation of a defendant's constitutional rights are the Dillion case, supra, and State v. Barela, 23 N.M. 395, 168 P. 545, L.R.A. 1918B, 844. The Barela case, supra, held that a law officer may force a suspect to remove his shoes and compare them with tracks found near the scene of the crime. The court in the Barela case made the distinction between real evidence. [15] and oral evidence obtained by compulsion and held that the self-incrimination privilege contained in Article 2. Section 15 of the New Mexico Constitution was not violated. The court went on to hold that the fact of the evidence being obtained by unlawful search and seizure did not render it inadmissible inasmuch as the method used in obtaining the evidence does not affect its admissibility. In the Dillion case, supra, this court held that liquor seized under an illegal search warrant is admissible as the use of such evidence was not in violation of constitutional immunities from unreasonable search and seizure and compulsory self-incrimination as provided in Sections 10 and 15 of Article 2 of the New Mexico Constitution.

What then is the effect of the Rochin case? A recent California case, People v. Haeussler, 41 Cal. 2d 252, 260

P. 2d 8, dealing with a factual situation very nearly identical to the case here to be decided, and decided after the decision by the United States Supreme Court in the Rochin case, supra, held that the doctrine of the Rochin case did not apply. The court in the Haeusler case, supra, interpreted the Rochin decision as applying the due process clause only where there is such conduct as amounts to the exertion of a brutal and shocking force to acquire evidence. If such conduct exists then the due process clause should be brought into play to invalidate any conviction based upon the use of such evidence.

For other discussions and interpretations of the Rochin decision see Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct 725, 96 L. Ed. 919; Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469; Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 349, 97 L. Ed. 456; Albertson v. Millard, 106, F. Supp. 635; State of Arkansas v. Central Surety and Ins. Corp., 102 F. Supp. 444; People v. Sica, 112 Cal. App. 2d 574, 247 P. 2d 72; Wash. U. L. Q., 1952, 471; 9 Wash & Lee L. Rev. 192; 3 Syracuse L. Rev. 192; 3 Syracuse L. Rev. 378; 4 Stan. L. Rev. 591; 6 Rutgers L. Rev. 612; 27 Notre Dame Law. 453; 23 Miss. L.J. 293; 50 Mich L. Rev. 1367; 66 [16] Harv. L. Rev. 122; 15 Georgia B.J. 86; 21 Ford L. Rev. 287; and 40 Calif. L. Rev. 311.

The California court went on to state affiratively in the Haeussler case, supra, that a blood test taken in the usual manner is not in and of itself so brutal and shocking as to warrant the application of the Rochin doctrine. With this position we agree.

To better understand the view of the majority opinion in the Haeussler case, supra, as to the Rochin case, supra, the following is quoted therefrom at p. 12:

> "The essence of the Rochin decision is in the court's reference to Brown v. State of Mississippi, 297 U. S. 278, 56 S.Ct. 461, 80 L.Ed. 682, and other coerced confession cases. In the Brown case, a conviction based upon a confession obtained by torture was reversed because such a practice amounted to a wrong 'so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void'. 297 at page 286, 56 S.Ct. at page 465. So, in the Rochin case, the court said: 'Use of involun-

tary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even through statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.' 342 U.S. at pages 173-174, 72 S.Ct. at page 210, 96 L.Ed. 183. In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence.

". . . the Rochin opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor. Instead, the entire course of conduct was examined and found to be brutal and shocking. The court disclaimed any intent to fix rigidly the confines of due process by asserting that they must remain 'indefinite and vague'. That blood tests and similar techniques may stand against constitutional objection is suggested by the statement: 'We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrong-doers and bringing them to book. It does not fairly represent these decisions to suggest that they [17] legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.' 342 U.S. at page 174, 72 S.Ct. at page 210."

Returning then to the specific question before the court, it would seem clear that unless there is to be a departure by this court from the principles laid down many years ago in the Barela and Dillon cases, supra, then the petitioner's application must fail. It is true that the patrolman directing the withdrawal of the blood sample appears to have violated certain of petitioner's rights but the ad-

mission of the disputed testimony is not thereby prohibited by the decisions of this court. Compulsory or involuntary testimony from a defendant may and should be excluded but the rule in this jurisdiction has not been extended to cover real evidence or the case at hand.

We do not take issue with the results of the Rochin decision, supra. Any radical departure from traditional concepts of justice and fairness should find neither solace nor condonation in the courts. A conviction based upon facts amounting to a denial of due process should not be allowed to stand. This court does not, however, accede to the petitioner's proposition. The decisions of this state and a clear majority of our sister states are aligned against the contention of the petitioner, in the absence of facts sufficient to draw the case within the orbit of the due process clause as applied in the Rochin case. The petition for a writ of habeas corpus is therefore denied, and

IT IS SO ORDERED.

ROBERT E. FOX,
District Judge.

We Concur:
JAMES B. McGHEE,
C.J.
J. C. COMPTON,
J.
EUGENE D. LUJAN,
J.
AUGUSTUS T. SEYMOUR,
J.

[18-37] In the Fifth Judicial District Court in and for Eddy County of the State of New Mexico

Excerpts from Transcript of Testimony

[38-45] Mr. A. B. MUNCY a witness called by the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. REESE:

[46] Q. And did you see the defendant, Paul Breithaupt, here in Carlsbad?

A. Yes, sir.

Q. Where?

A. In the hospital at Carlsbad.

Q. Which hospital was that?

A. I believe it is the—Oh, I don't remember. I can't call the name of the hospital. It is the biggest hospital here, Memorial or something.

Q. Had you been informed that he had been taken to that hospital?

A. Yes, sir.

Q. Was he conscious or unconscious at the time you saw him?

A. He was unconscious.

(Recess and discussion off the Record.)

By Mr. REESE:

Q. I believe you stated in answer to my last question, Officer Muncy, that you did go to the hospital and see the defendant, Paul Breithauut there?

A. Yes, sir.

Q. Where was he when you saw him?

A. In one of the hospital rooms on an emergency table.

[47-48] Q. Was there anyone there attending to him at that time?

A. One of the Sisters was there and a doctor was there, yes sir.

Q. Which doctor was it, if you know?

A. I don't know which doctor was in there at that time.

[49-58] Q. Now, after you had decided that the man was—had the odor of intoxicating liquor on his breath, what did you do?

A. I asked if it was possible to have a blood test.

Mr. WARDEN: If the Court please, at this time, I desire to interpose a formal objection.

The COURT: All right, sir, proceed.

Mr. WARDEN: At this time, the defendant objects to any testimony relative to any blood test taken from this defendant unless it is shown conclusively by the State that the defendant voluntarily submitted to a blood test for the purpose of determining his intoxication or sobriety, and if it is not so shown to be entirely voluntary on the part

of the defendant, then I move that all such evidence be excluded from the record on the ground that to receive such evidence without the consent of the defendant is a violation of his constitutional right against self incrimination.

The COURT: All right, sir. I will let your objection to these qualifying questions and I will make a ruling at such time as the qualification has been completed.

By Mr. Reese:

Q. What was the defendant's condition at that time as to consciousness?

A. He was unconscious as far as I could tell.

Q. Now, did you obtain a blood specimen at that time?

A. Yes sir.

Q. And how was that done?

A. Dr. Womack, I believe is his name, took this blood test.

Mr. WARDEN: If the Court please, I believe it is proper to renew my objection at this time.

The COURT: All right, sir.

By Mr. Reese:

Q. What did you do with the blood that was obtained?

A. Took it to Artesia; had Dr. Stryjewski run an alcohol test on it.

Mr. WARDEN: I object to that last answer. That is obviously hearsay, what the Doctor did.

The COURT: You instructed him to run a test on it, did you, sir?

A. Yes sir.

The COURT: All right.

[59] NOTE RE OBJECTION AND RULING THEREON

(Jury excused and objections made as to proof of blood tests made by following witness—overruled.)

The COURT: Gentlemen, is this the witness by whom you expect to prove the contents of the blood sample taken?

Mr. REESE: Yes sir.

The Court: You may complete your objection now.

Mr. Warden: At this time, the defendant objects to the introduction of any evidence by any witness relating to the results of a laboratory analysis of a blood test taken from this defendant unless the state shows that the sample of blood was voluntarily given by the defendant on the ground that to permit the introduction of such testimony would be a violation of the defendant's constitutional right not to be compelled to testify against himself, or what we commonly call his right of self incrimination.

The Court: Any other objections?

Mr. Warden: That is the substance of my objection, Your honor.

The Court: The objection is overruled. I am inclined to the opinion that under the case that was shown me, the law in New Mexico is that such evidence is admissible. Is there any objection to an admission to the qualifications of this gentleman to make such a test; can you admit then that he is duly qualified to make such a test and to state his results derived?

Mr. Warden: I have no basis to challenge his qualifications, Your Honor.

The Court: Do you desire to challenge them?

Mr. Warden: No.

The Court: Then such an admission will be made?

Mr. Warden: I would rather the evidence be put on in a normal manner.

[60] Dr. C. A. Stryjewski, a witness called by the State, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Reese:

Q. State your name, please?
A. Dr. C. A. Stryjewski.
Q. Where do you live, Dr. Stryjewski?
A. Artesia.
Q. Artesia, New Mexico?
A. Yes sir.
Q. You are a duly qualified and licensed Osteopathic Physician and Surgeon?

A. Yes sir.

Q. Practicing in Artesia?

A. Yes sir.

Q. In the course of your profession, Dr., have you had occasion to make blood analysises?

A. Yes, we have been doing them routinely.

Q. Can you speak a little louder, please?

A. We have been doing them routinely.

Q. For whom?

A. For the City Police of Artesia.

Q. And have you made analysis for the alcoholic content of the blood?

A. Yes sir.

Q. Approximately how many of those tests would you estimate you have performed?

A. I don't recall off hand. Over fifty. Fifty by this method that I use.

[61] Q. How are analysises made to determine the alcoholic content of the blood?

A. Well, it is a fairly involved chemical proceedure. We have special equipment known as a Covert flask (phonetic); in it we place a blood sample in a little cup within the flask and the bottom of the flask contains a mixture of sulphuric acid and potassium dichlarate.

Q. Then what is done?

A. That is tritrated back—These are standard solutions of known concentrations with an equivalent with the amount spent, we determine the amount of alcohol present in the particular specimen.

Q. Is this a standard proceedure, Doctor?

A. Yes sir.

Q. And is it generally recognized by the medical profes-ion as being accurate?

A. Yes sir.

Q. In December—On December the 30 of 1950, did Officer Muncy furnish you a blood specimen to make an analysis of?

A. He did.

Q. And did you make an analysis in the proceedure that you have outlined?

A. I have.

Q. And what did you determine as a result of your tests as to that blood sample furnished you by Officer Muney?

A. Well, we made a determination and had a result of, I don't recall, 17 or 18 hundredths percen' alcohol.

The Court: Did you make a report?

[62] A. I made a report, yes. I made a written report.

The Court: To whom did you make the written report?

A. I gave one to the State Police and I believe one went to the Sheriff's office.

By Mr. Reese:

Q. Now, Doctor, you testified at the Preliminary Hearing in this case?

A. Yes sir.

Q. To refresh your memory——

A. I believe I have a copy of it here. 17 hundredths percent.

Q. You are testifying from your notes?

A. From a copy of the report.

Q. And it was 17 hundredths alcoholic concentration.

A. That is correct.

Q. Is that by weight or by volume, Doctor, or both?

A. The analysis is made by volume, the calculations on the basis of weight, gravity.

Q. What, Doc*otr*, is the generally accepted figure as to the amount of alcohol a person can have in his blood stream and remain conscious?

A. Remain conscious, about—it would be 23 or 22 hundredths percent.

Q. And at what point or percentage is a man ordinarily under the influence of intoxicating liquors to any degree?

A. The figure so far as I know in a couple states is 15 hundredths percent.

Q. Is that the figure generally accepted by the profession and medical writers?

A. That is considered—that is right, 15 hundredths percent.

Q. And a person with 15 hundredths percent alcohol is [63] under the influence of intoxicating liquors to some degree?

A. That is right.

Q. From the specimen you examined, what is your opinion as to whether or not the person from whom that blood was taken was intoxicated?

A. Well, we presume that the man was intoxicated.

Mr. REESE: That is all.

CROSS EXAMINATION.

By Mr. WARDEN:

Q. Doctor, in making this laboratory test, how many samples of the blood specimen were used?

A. I did one.

Q. Just took one sample?

A. One sample.

Q. Is it not customary in making chemical analysises of specimens of body fluid to test it more than once or to test more than one sample to check against error?

A. Not necessarily.

Q. Is it customary?

A. No, it isn't necessarily.

Q. Is it done?

A. Once—on some things, yes.

Q. For what reason?

A. To eliminate the chance of error.

Q. No such precaution was taken in this instance, was it?

A. No sir, no.

Q. Does it sometimes happen that—I will withdraw that question. This test tube contained how many cubic centimeters of blood?

[64] A. I don't recall. I didn't measure it. I would estimate it, if I recall, 10 or 15 cc's, maybe 20.

Q. How many ccs did you use in making this test?

A. Two twentieths.

Q. Two twentieths. Is there any possibility that this—That would be a drop or two of blood, would it not?

A. That is all.

Q. Is it possible that the one or two drops of blood that you examined may have been or had a different alcoholic content than some of the other blood in this tube?

A. Not much chance, no.

Q. Well, what chance?

A. Well, I might answer it this way: In doing tests

previously over a period of time, we have rechecked ourselves and always got the same results.

Q. Does any possibility exist that different samples from this same test tube might show different results?

A. Not hardly.

Q. Some possibility however?

A. It would be most negligible.

Q. What precaution did you exercise to determine that each sample of blood would be exactly the same as any other sample taken from this test tube?

A. We just carefully mix it.

Q. In a test tube of this kind, a sample of this kind, if there was some alcohol in the blood, would the alcohol rise in the tube?

A. No, it is freely mixable.

[65] Q. You mean it remains——

A. It remains throughout, concentrated throughout.

Q. It doesn't rise or it doesn't descend?

A. It doesn't rise.

Q. In your previous examinations of persons suspected of being intoxicated where you have made blood tests, did you on those occasions have the opportunity not only to analyze the blood but to observe the appearance and physical action of the person?

A. It has been my experience to draw the sample myself and do the analysis likewise.

Q. I see. And have you ever testified in any other case where your testimony is restricted solely to a laboratory examination of a sample of blood and you had no opportunity to observe the individual?

A. I haven't.

Q. That is your first experience?

A. That is the first one that I haven't seen.

Q. Doctor, I will read from what—this is taken from Tests for Intoxication of the National Safety Council, Chemical Tests for Intoxication, showing the relationship between alcohol in the blood and the degree of intoxication, which states that where the blood, alcohol concentrate is between .05 percent and .15 percent, the existence of intoxication is questionable, but some persons may be under the influence of alcohol, and where the concentrate is more than .15 percent, every person is under the influence, the

degree of intoxication being expressed by the illustration thus: .15 percent to .20 percent alcohol in the [66] blood, dizzy and delerious; .20 percent to .30 percent, dazed and dejected; .30 to .40 percent, dead drunk; .40 percent to .50 percent, dead. Is that in conformity to your experience?

A. I don't know the particular age of the authority that is given there.

Q. That is 1940. I should have mentioned that.

A. My experience has been that a person is, the concentration lessor than that is given, he is, the patient is under greater influence or more drunk than the concentrations given there. In other words, the man at .25 is at a point of unconsciousness, twenty-three, four, five or six. They vary a little.

Q. Didn't you state in the preliminary hearing, Doctor, that in your opinion anybody was intoxicated who had more than .10 percent of one percent?

A. I don't recall.

Q. Is it not true, Doctor, that the tolerance to alcohol varies from one individual to another?

A. Very much so, yes.

Q. Let me read from a New York Statute providing for the admission of blood tests analysis in evidence, states that there was .05 of one percent or less by weight of alcohol in his blood was prima facie evidence that the defendant was not in an intoxicated condition. Would you agree with that?

A. I would.

Q. That the presence of more than .05 of one percent and less than .15 percent was relavent evidence but was not to [67] be given prima facie effect on the issue, that is the issue of intoxication. Does that sound correct to you?

A. That is right.

Q. And that evidence that at the time there was evidence of .15 percent or more by weight of alcohol in the blood may be admitted as prima facie evidence of intoxication. Does that sound right?

A. That sounds right.

Q. What are the factors which—What are the factors involved which result in a different tolerance by different persons with respect to the same amount of alcohol?

A. I can't hardly answer that. I don't feel like I can tell you the differences of activity of individuals under different amounts of alcohol.

Q. Well, let me ask you, then, would you say that a man in good health, thirty years of age, weighing 200 pounds and an 18 year old boy weighing 120 pounds would share the same tolerance towards alcohol?

A. No, they wouldn't.

Q. The older——

A. The heavier individual, yes, weight, size the possibility that an individual has eaten or not eaten makes a difference in intoxication.

Q. A person's general condition of health?

A. That may influence him too.

Q. Whether or not the person at the time was taking some medication such as one of the sulpha drugs?

A. That is right.

Q. That is one thing that has quite some effect; has it not?

[68] A. (Witness nods head)

Q. And the person's particular condition on the occasion.

Mr. Warden: I believe that is all.

Redirect Examination.

By Mr. Reese:

Q. Doctor, have you in your experience examined other persons in connection with your blood analysis who had approximately the same alcoholic content in their blood?

A. Yes sir, several.

Q. And what was your experience with them as to whether or not they were in your opinion under the influence of intoxicating liquor?

A. I have seen them where they were totery at less than .15 and I have seen them where they were rather steady at .16 .17 and .18 percent.

Q. Did you ever examine anyone in connection with your tests at .17 who in your opinion was in no degree under the influence of intoxicating liquor?

A. I always feel that—when they are up at .15, they show evidence of intoxication.

Q. Now, these tolerances that you have been questioned about and asked about, .05 to .15 and then .15 to .20, are based on the experience, national experience in blood tests, aren't they?

A. They are based on this particular method of blood testing.

Q. And in nation wide testing of this blood test?

A. Yes.

Mr. REESE: That is all

[69] RECROSS EXAMINATION.

By Mr. WARDEN:

Q. Is this particular blood test that you used, is that identified by any name or process?

A. Yes, it is known as the Woodmark Technique, modification of the Woodmark Technique.

Q. When was this perfected?

A. This was published in February, 1938.

Q. And you have based all your calculations and figures on this test published in 1938?

A. Yes.

Q. Would you say that it is possible for a person with .17 percent concentration of alcohol in the blood to be able to safely operate an automobile?

A. No.

Q. Could it be done?

A. Yes.

Q. It could be done?

A. Could be.

Mr. WARDEN: That is all.

REDIRECT EXAMINATION.

By Mr. REESE:

Q. Doctor, do you mean by that that a person with that alcoholic concentration could drive or could drive safely?

A. He could drive, but, providing everything was all right and nobody was in his way.

Mr. REESE: That is all.

RECROSS EXAMINATION.

By Mr. WARDEN:

Q. In other words, he might not be able to cope with an [70-77] emergency but so long as everything is smooth sailing, he can get by?

A. That is right, so long as there is nothing in the way, according to the authorities that made a substantial number of tests under these circumstances and made a publication of it. They state how much reaction time is diminished under certain concentrations and they tell you that even up at one tenth of one percent, .1 percent that an individual drives in what is known as channel driving. He is driving straight, too straight.

Q. But the possibility exists that a man with .17 percent could drive properly?

A. We have individuals that have driven under higher concentrations of alcohol but not safely.

Q. Well, have stayed out of trouble?

A. If he is out of trouble, he will drive.

The COURT: Thank you, Doctor.

[78-79] Dr. C. L. WOMACK, a witness called by the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. REESE:

[80] Q. Did you see the defendant brought into the hospital?

A. No, I did not. The first time I saw him, he was on the emergency table in the hospital.

Q. Did you see Officer Muncy there at the hospital at that time, Doctor?

A. Yes, he was there at the time.

Q. Did you withdraw a sample of blood at his request from the defendant?

A. Yes sir.

Mr. WARDEN: If the Court please, I would like to make a formal objection to any testimony along this line on the grounds previously stated with respect to the other Doc-

tor's testimony that this amounts to compelling the defendant to testify against himself.

The COURT: Same ruling. The objection was overruled.

[81] Supreme Court of the United States

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—April 23, 1956

On petition for writ of Certiorari to the Supreme Court of the State of New Mexico.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket as No. 897.

April 23, 1956.

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